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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1971

MIKE GRAVEL, UNITED STATES SENATOR, PETITIONER

v.

UNITED STATES OF AMERICA

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v.

MIKE GRAVEL, UNITED STATES SENATOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
ROBERT C. MARDIAN,
Assistant Attorney General,
ALLAN A. TUTTLE,
Assistant to the Solicitor General,
WILLIAM H. PUTT,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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Most of the material in Senator Gravel's brief and the *amicus curiae* brief for the Senate relates either to the claim that private republication is protected "Speech or Debate" or to the claim that Senators may immunize aides and private third persons under their "Speech or Debate" privilege; however, two arguments, one made in each brief, cut across these discrete issues. Senator Gravel suggests that the record indicates that the purpose of the grand jury investiga-

tion is to attack him; the Senate urges that Congress can define the bounds of its own privilege.

1. Senator Gravel argues (Gravel Br. 17, 19–20, 94–95) [1] that the Department of Justice intends, by questioning Dr. Leonard Rodberg and third parties, indirectly to conduct an investigation into his legislative acts, which could not be accomplished by subpoena of the Senator himself. Although this contention may be of only peripheral relevance to the broad legal issues presented by this case, we think it is important to point out that the record does not support the Senator's claim. The grand jury investigation into possible violation of federal criminal statutes (Gov't Br. 4 n. 2a) related to public disclosure of the "Pentagon Papers," and has not been directed to Senator Gravel individually, or as a United States Senator. Nor has it sought to affect the transaction of any business before Congress.

In the course of the investigation, subpoenas were served upon a large number of individuals,[2] but none

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[1] "Gravel Br." refers to the consolidated brief for Senator Mike Gravel; "S. Br." refers to the Brief for the United States Senate, *Amicus Curiae*.

[2] The number and identity of those witnesses so far subpoenaed remains confidential with the grand jury except for those few who have contested their summons, *e.g.*, *United States* v. *Doe* (*In the Matter of Idella Mass*), 451 F.2d 466 (C.A. 1); *In the Matter of Ralph Stavins*, EBD No. 71–201 (D. Mass. Jan. 20, 1972); *In the Matter of Noam Chomsky*, EBD No. 71–202 (D. Mass. Jan. 20, 1972); *In the Matter of Richard Falk*, EBD No. 71–165 (D. Mass. Jan. 20, 1972); *In the Matter of Samuel L. Popkin*, EBD Nos. 71–164 (D. Mass. August 19, 1971), 71–196 (October 8, 1971), and 71–210 (October 29, 1971); *In the Matter of David Halberstam*, EBD No. 71–211 (D. Mass. pending).

except Dr. Rodberg was a member of any Congressional committee or legislator's staff. Moreover, most of these persons have had no known contact with Senator Gravel, and no known contact with the papers after they came into his possession.[3] On June 29, 1971, Dr. Rodberg was hired on the personal staff of Senator Gravel. On that date the Senator conducted a public subcommittee hearing to disclose the contents of the classified "Pentagon Papers" which he had obtained "unauthorizedly" (Gov't Pet. App. A, p. 18). Although the government has contended at points in this litigation that there would be no constitutional impediment to calling Senator Gravel as a witness and that, consistent with the Constitution, he could be indicted if he engaged in certain unlawful activities, it has disavowed any intention of calling him at all, and has never done so.[4]

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[3] We assume that Senator Gravel obtained the papers on or about June 29, 1971, the date on which he held the subcommittee hearing.

[4] Every reference to the record cited in support of this contention that the government intended to call the Senator (App. 81, 82, 84; Gravel Br. 19–20; 91–92) relates to legal argument by the investigating attorney, Mr. Vincent, that Dr. Rodberg as an aide could claim no greater privilege by derivation (App. p. 81) than Senator Gravel could claim for himself. For example, in concluding, Mr. Vincent said: "Now if [the privilege] cannot apply to criminal proceedings of a congressman, as I say, a fortiori, it cannot apply to criminal proceedings involving members of the staff" (App. p. 84). The rest of the record is equally devoid of support for the Senator's assertion that the government intended or stated that it intended to call him.

Senator Gravel's involvement in this case stems from his motion to intervene and to quash the Rodberg and Webber subpoenas. Thus, rather than presenting a case of the executive attempting to conduct an inquisition concerning a Senator, the record reflects an interposition of alleged legislative privilege to bar important aspects of a grand jury investigation of possible criminal activity by persons who are not members of Congress.

2. The Senate apparently claims the absolute right to determine the scope of its own privilege: "Neither the Executive nor the Judiciary can determine the extent of Congressional privilege if 'separation of powers' is to retain its function" (S. Br. 6). This is puzzling language, and it flies in the face of an important aspect of the general constitutional theory of our government, namely, that in cases otherwise properly before the federal courts, those courts have the duty to determine the conformity of the actions of the legislative and executive branches, as well as those of the judicial branch, with the Constitution. See *Marbury* v. *Madison*, 1 Cranch 137. Here a grand jury has asserted the power to question certain witnesses about certain matters, and Senator Gravel has challenged that proposed action as unconstitutional; that is the kind of conflict this Court has historically resolved. That the scope of the Speech or Debate Clause is not a problem outside the sphere of judicial power and competence is clearly established by *Kilbourn* v. *Thompson*, 103 U.S. 168; *United States* v. *Johnson*, 383 U.S. 169; and *Powell* v. *McCormack*, 395

U.S. 486.[5] In short, this is a case calling for judicial interpretation of the Speech or Debate Clause, not for judicial "comity" (S. Br. at 3) to be extended to either the legislative or executive branch.

3. Advancing a "functional approach" to the Speech or Debate Clause (Gravel Br. 21–24) and stressing the "informing function" of Congress (Gravel Br. 37–48), Senator Gravel urges that his private republication of the Pentagon Papers through the Beacon Press, in Boston, is "Speech or Debate in either House".

We do not doubt—and, indeed we urge—that the Clause should be construed in the light of its intended function; but we do not believe its function has so changed since 1787 as to require that it be given a meaning today which it clearly did not have when written and adopted. We do not minimize the importance of a Congressman's responsibility to educate and inform the public (see *McGovern* v. *Martz*, 182 F. Supp. 343, 348 (D. D.C.)), but, as Senator Gravel's brief itself shows, the interest and propriety of a member of Congress communicating with and informing his constituents is not a new role forced on legislators by changing times (Gravel Br. 53–67). In 1787, legislators wrote and spoke to their constituents and sought their

[5] A claim similar to that in the Senate's brief was asserted by Commons and decisively rejected in *Stockdale* v. *Hansard*, 9 Ad. & E. 1, 147–148, 112 Eng. Rep. 1112, 1168 (K.B.), where Lord Denman concluded: "Where the subject matter [of a claimed privilege] falls within their jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the jurisdiction of the House of Commons."

advice. If the framers believed that Congress could function effectively without private republication being privileged, a claim of changed conditions is not sufficient to alter the effect of that judgment.

As our original brief demonstrates in more detail, private republication was not thought by the framers to be privileged speech or debate. English law at the time of the adoption of our Constitution did not consider such republication privileged. However unpopular *Rex* v. *Williams*, 2 Show. K. B. 471, 89 Eng. Rep. 1048, may have been, and however closely it led to the subsequent enactment of the English Bill of Rights, the English decisions closest in time to the adoption of the American Constitution held private republication not to be privileged. *Rex.* v. *Abingdon*, 1 Esp. 226 (1794), 170 Eng. Rep. 337; *Rex* v. *Creevey*, 1 M. & S. 272, 105 Eng. Rep. 102; cf. *Rex* v. *Wright*, 8 T. R. 293, 101 Eng. Rep. 1396 (House Report). See also, *Rex* v. *Salisbury*, 1 Ld. Raym. 341 (K.B. 1699) which is considered to have settled that "* * * there was no privilege for those who published documents connected with [Parliamentary] proceedings to the world at large." 8 Holdsworth, *History of English Law* 376. Justice Story reflects this understanding, as does the language of the Speech or Debate Clause itself, in concluding that the Clause would not immunize a member for private republication of a speech. Story, 1 *Commentaries on the Constitution* (5th ed. Bigelow 1891) 630–631. See also 1 Kent, *Commentaries on American Law* (7th ed. 1851), 249 note c.

Senator Gravel relies extensively on Jefferson's protest over the grand jury investigation of Congressman

Cabell and Congress' repayment in 1840 of Congressman Matthew Lyon's fine (Gravel Br. 53–58; 64–67). But these were not expressions of views of the framers or Congress on the Speech or Debate Clause. Both Cabell and Lyon were asserted to be guilty of seditious libel, and the actions against them were challenged as infringements of freedom of the press and speech of citizens generally. Senator Gravel's extensive quotation from the protest of Jefferson omits his characterization of precisely what right of Congressman Cabell he believed to be offended. Jefferson argued that for the judiciary to interpose itself between the Congressman and his constituents:

> is to leave us, indeed, the shadow, but to take away the substance of representation, *which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business.* [Italicized language omitted in Gravel Br. 57; XVII The Writings of Thomas Jefferson (Memorial ed. 1904) 359.] [6]

Matthew Lyon was—as he had predicted—the first defendant prosecuted under the Sedition Act of 1798, 1 Stat. 596. As this Court has observed it was the "great controversy" over this Act "which first crystallized a national awareness of the central meaning of

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[6] The Virginia House of Delegates condemned the Cabell presentment as a "violation of fundamental principles of representation * * * an usurpation of power * * * and a subjection of a natural right of speaking and writing freely." Smith, *Freedom's Fetters* 95.

the First Amendment" *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 273. Contemporaneously the Sedition Act was condemned by the Virginia Resolution of 1798 as an assertion of federal power—

> expressly and positively forbidden by one of the amendments thereto,—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right. [4 Debates on the Federal Constitution (Elliott ed. 1845) 528–529]

And, on July 4, 1840, when Lyon's fine was remitted (6 Stat. 802), Congress had before it the House Judiciary Committee report expressly basing its recommendations on First Amendment grounds (8 Cong. Globe, 26th Cong., 1st Sess., 411).

The investigation of Cabell and prosecution of Lyon were not attacked because they represented breaches of a unique Congressional privilege; on the contrary, they were attacked because the Congressmen were the victims of a breach of a right common to all citizens. And this First Amendment attack on the Sedition Act "[a]lthough * * * never tested in this Court, * * * has carried the day in the court of history." *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 276. Neither case can be viewed as a contemporaneous expression of a belief that a Congressman's unique privilege with respect to Speech or Debate covered his private republication of protected speech.

Insofar as Senator Gravel's claim that private republication is an activity immune from grand jury inquiry rests on the argument that educating and informing the public is one of the things "generally done" by Congressmen in the discharge of their duties, his claim fails because not all things "generally done" by Congressmen are Speech or Debate. The framers clearly did not draft language to reach all activities of legislators and, as we noted in our main brief, this Court's decision in *United States* v. *Johnson*, 383 U.S. 169, 172, rejects such a position. It is part of a legislator's contemporary role to intercede with executive agencies on behalf of constituents,[7] but such conduct was held not to be Speech or Debate.

That private republication and communications are not Speech or Debate "does not exclude consideration of other protection" (Gov't. Pet. App. A, p. 28).

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[7] The authorities relied on by Senator Gravel (Gravel Br. 41, n. 41)—among others—support the view that personal intercessions with executive agencies, quite as much as public education, are a part of a contemporary Congressman's role. Bibby and Davidson, in *On Capitol Hill* (1967) 15–16, describe Congress' function of "over[seeing] the administration," and note in addition to Congress' "authority to pass laws affecting agency," "less formal techniques, such as * * * informal communications between congressional and agency personnel." Griffith, in *Congress—Its Contemporary Role* (4th ed. 1967), notes that dealing with constituents can take up to eighty percent of a Congressman's time, often to the extent of interfering with legislative tasks (p. 78), but he concludes (p. 79):

> In a government as complex as ours, surely there is much to be said for the individual citizen having an advocate in his behalf if he feels in some fashion helpless before a gigantic bureaucracy. To serve in this manner is by no means the least important function of a Congressman.

Members of Congress and their aides—in common with everybody else—enjoy First Amendment protection in their speech and writing. *Hentoff* v. *Ichord*, 318 F. Supp. 1175, 1179 (D.D.C.). Thus, at the very least, if the communications concern a matter of public interest (*Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29), they would be immune from both civil (*New York Times, Inc.* v. *Sullivan, supra*; *Time, Inc.* v. *Hill*, 385 U.S. 374) and criminal liability (*Garrison* v. *Louisiana*, 379 U.S. 64) for libel or invasion of privacy for republications in the absence of knowing or reckless falsehood. Further, in our main brief (pp. 37, 51–54), we suggest that when acting "within the outer perimeter of [the] line of duty" (*Barr* v. *Matteo*, 360 U.S. 564, 575), they might enjoy an absolute immunity from civil liability.

These "other protection[s]" (Gov't Pet. App. A, p. 28) undercut Senator Gravel's assertion that "[i]t is no exaggeration to say that this claim of the executive branch challenges the fundamental character of our tripartite system of government" (Gravel Br. 50). The First Amendment in its historic role as bulwark against criminal prosecution for seditious speech (*New York Times Co.* v. *Sullivan, supra*) is, in the first instance, a protection against executive excess. Thus legislators—in common with all citizens—have a wide degree of protection from criminal, as well as civil, liability for their speech. A legislator's First Amendment rights take up where the Speech or Debate Clause ends, and both serve to protect the

separation of powers that the Senate and the Senator claim is threatened by this investigation.[8]

But these First Amendment and other protections do not immunize legislative aides[9] from answering questions about republication before a federal grand jury. As this Court stated in *Blair* v. *United States*, 250 U.S. 273, 281, "the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned * * *." While this Court has recognized certain limits to the disclosure of information required by legislative committees (See *e.g.*, *Sweezy* v. *New Hampshire*, 354 U.S. 234; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S

[8] In a related separation of powers argument both Senator Gravel and the Senate try to distinguish the consistent line of cases limiting the Clause to its traditional scope (*Kilbourn*, *Dombrowski*, *Powell*) by observing that they were civil cases involving violations of "preferred constitutional rights [of individuals]" (Gravel Br. 49–50; see S. Br. 9), and characterizing the present case as a confrontation between the legislature and executive. However, *United States* v. *Johnson*, *supra*, involved the prosecution of a Congressman by the executive, yet this Court careful limited the protection of the Congressman under the Clause to his speech-making and held his intervention with the Justice Department to be beyond the reach of the Clause. *United States* v. *Johnson*, *supra*, 383 U.S. at 172.

[9] The government has made it clear throughout this litigation that it does not intend to subpoena Senator Gravel, even assuming it would be constitutionally permissible to question him with respect to the private republication through Beacon Press.

539), no such limitations of disclosure have been recognized with respect to testimony before grand juries.[10]

4. Senator Gravel and the Senate advance a number of arguments to support their claim that the immunity afforded members of Congress by the Speech or Debate Clause can be extended to bar inquiry of aides and third parties by a grand jury investigating the possible criminal liability of persons other than members. These arguments do not support the suggested conclusions. General observations about the separation of powers and the importance and usefulness of legislative aides are not a sufficient basis for establishing such an expansive interpretation of the Clause, in the face of a deliberate choice of the framers to limit its protections to Senators and Representatives themselves,[11] and in the face of the consistent holdings of this Court refusing to hold that Congressional employees are immunized by the Clause, although the rationale for their protection is virtually identical to that advanced with respect to aides. Since these points

[10] Cf. *United States* v. *Caldwell*, pending on writ of certiorari, No. 70–57, *Branzburg* v. *Hayes*, pending on writ of certiorari, No. 70–85, and *In the Matter of Paul Pappas*, pending on writ of certiorari, No. 70–94, raising the issue of a newspaperman's privilege, under freedom of the press, to refuse to appear before a grand jury and divulge confidences. That is not an issue here.

[11] Senator Gravel characterizes the actual language of the Clause as stylistic (Gravel Br. 92, n. 123). If, as he urges, the framers regarded language clearly reaching only Senators and Representatives as not different in substance from the more general language of the English Bill of Rights, that surely suggests that they interpreted the English document to reach only members of Parliament, not that they meant to reach other persons by language not suited for that purpose.

are developed in our main brief, we respond here to certain narrower contentions which do not, upon examination, provide the support for Senator Gravel's position that is claimed.

The English authorities cited by Senator Gravel do not sustain a parliamentary privilege for third parties. *Rex* v. *Rule*, 2 K.B. 375 (1937) (Gravel Br. 104–105), allowed an appeal from a conviction for libels contained in communications from a constituent to a member of Parliament. The privilege applied by the King's Bench was not that of the member, but of the constituent. The case was governed by the common law doctrine of qualified privilege, a privilege which is well known on both sides of the Atlantic (see *Prosser, Torts* (2d ed. 1955) 618–619) and which depends in no way upon the parliamentary privilege of freedom of speech. The court held (2 K.B. at 379) that the communication "fell within the legal canon" that:

> A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty * * *.

Assuming the interest of Rule, the court merely held that the member of Parliament, like the Secretary of State for Home Affairs (with whom Rule was seeking an audience) had "a corresponding interest."

Ex Parte Wason, L.R. 4 Q. B. 573 (1868) (Gravel Br. 103–104), narrowly holds that two Lords and a third party can not be prosecuted for a conspiracy to have the Lords utter false statements in the House.

Noting that "statements made by members of either House of Parliament in their places in the House * * * could not be made the foundation of civil or criminal proceedings," Chief Justice Cockburn concluded that "a conspiracy to make such statements, would not make the persons guilty of it amendable to the criminal law." (L.R. 4 Q.B. at 576). The case stands for the principle that persons cannot be made criminally liable simpy for agreeing that one of them will engage in behavior that cannot be made the subject of legal liability; it falls far short of establishing a general principle that the parliamentary freedom of speech can be invoked on behalf of third persons.

Neither do the English cases support Senator Gravel's view that legislative conduct cannot be inquired into in a judicial proceeding. Thus, while Parliament has asserted the right to punish its own members taking bribes (May, *Parliamentary Practice* (16th ed. 1957) 115–116), it has been asserted that such a member is "liable to prosecution in the same manner as bribed voters and persons corrupting them" (Bowyer, *Constitutional Law of England*, (2d ed. 1846) 90), and this view is supported by the Commonwealth cases to the limited extent that they consider the problem. *Rex* v. *Boston*, 33 Commw. L.R. 386 (Australia); *Regina* v. *White*, 13 S.C.R. 322 (N.S.W.); *Regina* v. *Bunting*, 7 Ont. Rept. 524 (Canada).

Senator Gravel and the Senate implicitly recognize that this Court's refusal to immunize Congressional employees in *Kilbourn* v. *Thompson*, 103 U.S. 168; *Dombrowski* v. *Eastland*, 387 U.S. 82; and *Powell* v.

McCormack, 395 U.S. 486, counts heavily against their position. They seek to distinguish those decisions on the ground that the employees were "effectuating unconstitutional legislative acts" (S. Br. 12; see also Gravel Br. 108). Their suggestion is that inquiry into criminal but not constitutionally prohibited acts is an interest of a lesser order than inquiry into constitutional violations.

But it would be unsound to distinguish between "nonconstitutional" and "constitutional" harms in deciding what claims may give rise to an adjudication on the merits and to possible redress. For the most part, the Constitution is violated only when there is an act under color of authority of the government. Many public acts of individual members of Congress are not acts of the government in the relevant sense. Thus, if an aide (with the member's approval) conspired to get police officers to make an unlawful search for documents, there would be a constitutional violation; but if the aide hired a private "thug" to break in and steal documents, that would not be a constitutional violation. The victim's chance of recovery and the applicability of the Speech or Debate Clause cannot turn on such a distinction.

There is also the intimation in both briefs (S. Br. 12; Gravel Br. 107–108) that *Kilbourn*, *Dombrowski* and *Powell* may be distinguishable because they involved redress of individual rights, whereas this case involves inquiry into criminal liability. If the suggestion is that redress of civil wrongs to individuals is more important than enforcement of the criminal law,

it ignores the fact that effective enforcement of criminal statutes is a cornerstone of individual security and liberty in any free society. If the suggestion is that any attempt to enforce the criminal law that involves inquiries about conduct with which a Senator may be concerned is necessarily a conflict between the legislative and executive branches and thus lies at the core of the historic legislative privilege, it is artificial.

Senator Gravel urges (Gravel Br. 100–103) that *United States* v. *Johnson*, 383 U.S. 169, substantiates his contention that aides and private persons can not be asked about matters touching on his legislative activities. But as we point out in our main brief, the Supreme Court considered that case only in the context of the conviction of Congressman Johnson himself; it addressed itself only to what kind of evidence could be the basis for the conviction of a Congressman. The very same evidence which the Court held wrongly introduced as to Johnson had also been instrumental in the conviction of his private co-conspirators. The court of appeals held their conviction to be without error, 337 F.2d 180 (C.A. 4), and this Court did not suggest that this determination was erroneous. This case does not call for a determination that Senator Gravel's legislative acts are admissible in a prosecution against him; but only that, as the court of appeals held in *Johnson*, information touching on those acts is not absolutely immune from inquiry in investigation of the possible criminal acts of other persons.[12]

[12] Senator Gravel suggests (Gravel Br. 127) that aides and third parties are subject to discipline much like members of Congress, citing *Anderson* v. *Dunn*, 6 Wheat. 204. However,

Perhaps the difficulties of Senator Gravel's position in this case are best summed up by a short paragraph that points toward but then fails to accept the obvious implication of much of his argument. That paragraph (Gravel Br. 93) reads:

> In fact, we will assume that if the Senator personally had "stolen" the Pentagon Papers, and if such an act were a crime, then he could be prosecuted for that criminal act. Certainly, then, aides and other assistants could likewise be prosecuted.

If aides and assistants could be prosecuted for stealing documents at the Senator's direction, even though these documents were to be used in Speech or Debate, then surely such aides could be prosecuted for knowingly receiving documents stolen by a private person. Surely also a private person could be prosecuted for stealing the documents even though relevant testimony might touch on his contacts with members of a Senator's staff. If this is conceded, how can it be persuasively contended that a grand jury would be barred from inquiring whether an aide has knowledge of who has stolen documents or whether the aide himself has incurred criminal liability by receiving the documents or conspiring with the thief? Although this hypothetical situation is simpler than the relevant law and

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while Congress may have the power to punish directly contemptuous acts committed by nonmembers before Congressional bodies, Congress has never asserted a power over employees of individual members analogous to its constitutional right to discipline the members themselves (U.S. Constitution, Art. I, § 5).

probable facts concerning the acquisition and unauthorized distribution of the "Pentagon Papers," it is close enough to suggest the unworkability of the distinction between liability for theft and grand jury inquiry that Senator Gravel attempts to draw.

The extraordinary powers to confer immunity that Senator Gravel's argument would grant to members of Congress can not so easily be ignored. These powers, as we argue in our main brief, are not warranted by constitutional language, history or the legitimate needs of Congress for protections that will assure its effective functioning.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ROBERT C. MARDIAN,
Assistant Attorney General.

ALLAN A. TUTTLE,
Assistant to the Solicitor General.

WILLIAM M. PIATT,
Attorney.

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